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IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 766

EDWARD K. BARSKY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

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INDEX

PAGE

Petition for Writ of Certiorari: 1

Statement on the Matter Involved 1

Jurisdiction 9

Statutes and Resolutions Involved 9

Questions Presented 11

Reasons Relied on for Allowance of the Writ 13

Conclusion 21

Brief in Support of Petition: 23

Opinions Below 23

Jurisdiction 23

Specifications of Errors 23

Summary of Argument 24

Argument: 26

I—The United States Court of Appeals for the District of Columbia has decided a question of general importance, relating to the construction of the Constitution and of the Resolution, which has not been, but should be, settled by this Court 26

II—The Resolution is Unconstitutional 29

A—The Resolution violates the First Amendment to the Constitution of the United States 29

B—The Resolution violates the Fifth and Sixth Amendments to the United States Constitution 36

PAGE

C—The Resolution violates the Ninth and Tenth Amendments to the United States Constitution 38

III—It was reversible error for the Trial Court to admit into evidence petitioners' testimony before the House Committee 41

Conclusion 44

TABLE OF CASES CITED

Alkon v. United States, 163 Fed. 810 (C. C. A. 1, 1908) 42, 43

Amey v. Long, 9 East 473 (K. B. 1808) 19

Barry v. United States ex rel. Cunningham, 279 U. S. 597 ..... 15, 39

Baumgartner v. United States, 322 U. S. 665 (1944) 32

Boehm v. Commissioner of Internal Revenue, 326 U. S. 287 (1945) 33

Bridges v. California, 314 U. S. 252 (1941) 17, 31, 32, 35

Bridges v. Wixon, 326 U. S. 135 (1945) 32

Brown v. United States, 276 U. S. 134 (1928) 20

Butts v. Merchants & Miners Transportation Co., 230 U. S. 126 37

Cafeteria Employees Union v. Angelos, 320 U. S. 293 (1943) 32

Cameron v. United States, 231 U. S. 710 (1914)..... 42

Cantwell v. Connecticut, 310 U. S. 106 (1940) 35

Carlson v. California, 310 U. S. 106 (1940) 16, 18, 35

Chambers v. Florida, 309 U. S. 227 (1940) 18

PAGE
Chapman, In re., 166 U. S. 661 (1897) 15, 39
Cline v. Frank Dairy Co., 274 U. S. 445 (1927) 17, 37
Cole v. Arkansas, 16 U. S. Law Week 4251 20
Colonial Sugar Refining Co. v. Attorney General, 15 Commonwealth L. R. 182 (1912) rev'd L. R. (1914) App. Cas. 237 30
Commonwealth v. International Harvester Co., 148 Ky. 37, 145 S. W. 1132 (1912) 19, 20
Commissioners v. Sellew, 99 U. S. 624 (1879) 20
Connally v. General Construction Co., 269 U. S. 385 (1926) 18
Counselman v. Hitchcock, 142 U. S. 547 (1892) 42
Cresson v. Louisville Courier-Journal, 299 Fed. 487 (C. C. A. 6, 1924) 27, 28
Cummings v. Missouri, 71 U. S. 277 (1867) 26, 30
DeJonge v. Oregon, 299 U. S. 353 (1937) 14, 16, 18, 20, 32, 34, 35, 38
Douglas v. Commissioner of Internal Revenue, 322 U. S. 275 (1944) 33
Ex Parte Endo, 323 U. S. 283 (1944) 17
Glickstein v. United States, 222 U. S. 139 (1911) 43
Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102 (1920) .. 30
Grosjean v. American Press Company, 297 U. S. 233 (1936) 32
Hague v. C. I. O., 307 U. S. 496 (1939) 28
Haley, In re, 41 F. (2) 379 (S. D. Cal., 1930) 43
Hannegan v. Esquire, 327 U. S. 146 (1946) 17
Hartzel v. United States, 322 U. S. 680 (1944) 19
Hearst v. Black, 87 F. (2) 68 (App. D. C. 1936) 27
Helvering v. Reynolds Tobacco Co., 306 U. S. 110 (1939) 33

PAGE

Herndon v. Lowry, 301 U. S. 242 (1937) 16, 32, 38

Ironclad Mfg. Co., In re, 201 Fed. 66 (C. C. A. 2, 1912) 19

Jacobs v. United States, 161 Fed. 694 (C. C. A. 1, 1908) 41, 42, 43

Jamison v. Texas, 318 U. S. 413 (1943) 35

Jones v. Opelika, 316 U. S. 584 (1942) 13, 28, 30

Jones v. Securities & Exchange Commission, 298 U. S. 1 (1936) 28, 38

Josephson v. United States, 165 F. (2) 82 (C. C. A. 2, 1947) cert. den. 333 U. S. 27n, 28n, 32n, 37n, 41n

Jurney v. MacCracken, 294 U. S. 125 (1935) 15

Keegan v. United States, 325 U. S. 478 (1945) 19

Kilbourn v. Thompson, 103 U. S. 168 (1881) 15, 25, 29, 38, 39, 40

Kraus & Bros. v. United States, 327 U. S. 614 (1946) .. 16, 17, 37

Lanzetta v. New Jersey, 306 U. S. 451 (1939) 17, 37

Largent v. Texas, 318 U. S. 418 (1943) 17

Lovell v. Griffin, 303 U. S. 444 (1938) 13, 16, 17, 18, 28, 32, 35

Marshall v. Gordon, 243 U. S. 52 (1917) 15, 38

Martin v. Struthers, 319 U. S. 141 (1943) 35

McGrain v. Daugherty, 273 U. S. 135 (1927) 15, 28, 29, 38, 39

Mellon v. Brewer, 18 F. (2) 168 (App. D. C. 1927) cert. den. 275 U. S. 530 (1927) 27

Merchants National Bank v. Commissioner of Internal Revenue, 320 U. S. 256 (1943) 33

Munroe v. United States, 216 Fed. 107 (C. C. A. 1, 1914) 19

PAGE

Murdock v. Pennsylvania, 319 U. S. 105 (1943) 32

Musser v. State of Utah, 333 U. S. 95 (1948) 17

Musser v. Utah, 333 U. S. 95 (1948) 35

National Lead Co. v. United States, 252 U. S. 140 (1920) 33

Near v. Minnesota, 283 U. S. 697 (1931) 14, 34

Pacific Railway Commission, In re, 32 Fed. 241, 250 (N. D. Cal. 1887) 38

Poe v. Seaborn, 282 U. S. 101 (1930) 33

Reed v. County Commissioner of Delaware County, 277 U. S. 376 (1928) 15, 39

Russell v. McLellan, 21 Fed. Cas. 12, 158 (D. Me. 1847) 19

Schenck v. United States, 249 U. S. 47 (1919) 31

Schneider v. Irvington, 308 U. S. 147 (1939) 17, 18, 35

Schneiderman v. United States, 320 U. S. 118 (1943) ... 17, 32, 37

Screws v. United States, 325 U. S. 91 (1945) 19, 32

Sinclair v. United States, 279 U. S. 263 (1929) 15, 28, 29, 38, 39

Smith v. Cahoon, 283 U. S. 553 (1931) 13, 28

Spalding v. Vilas, 161 U. S. 483 (1896) 27

Stromberg v. California, 283 U. S. 359 (1931) 14, 16, 32, 34, 35, 38

Sykes, In re, 23 Fed. Cas. 13, 707 (S. D. N. Y. 1878) ... 19

Taylor v. Mississippi, 319 U. S. 583 (1943) 32

Thomas v. Collins, 323 U. S. 516 (1945) 16, 17, 31 32, 33, 34, 35

Thornhill v. Alabama, 310 U. S. 88 (1940) 16, 18, 28, 32, 35

PAGE

United States v. American Tobacco Co., 146 Fed. 557 (S. D. N. Y. 1906) 19

United States v. Ballard, 322 U. S. 78 (1944) 17, 30

United States v. Carolene Products Co., 304 U. S. 144 (1938) 18, 36

United States v. Cerecedo Hermanos y Co., 209 U. S. 337 (1908) 33

United States v. Cohen Grocery Co., 255 U. S. 81 (1921) 17, 37

United States v. De Lorenzo, 151 F. (2) 122 (C. C. A. 2, 1945) 42

United States v. Hewitt, 328 U. S. 189 (1946) 20

United States v. Monia, 317 U. S. 424 (1943) 41

United States v. Murdock, 290 U. S. 389 (1933) 19

United States v. Reese, 92 U. S. 214 (1875) 17, 37

United States v. Sullivan, 332 U. S. 689 (1948) 37

Wakefield v. Housel, 288 Fed. 712 (C. C. A. 8, 1923) 43

West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943) 14, 17, 18, 31, 32, 33, 34, 36

Wilson v. United States, 221 U. S. 361 (1911) 20

Winters v. New York, 16 U. S. Law Week 4279 ... 16, 17, 18, 35, 36n, 38

Yenkichi Ito v. United States, 64 F. (2) 73 (C. C. A. 9, 1933) cert. den. 289 U. S. 762 (1933) 20

Yo Cong Eng v. Trinidad, 271 U. S. 500 (1926) 37

Other Authorities Cited

PAGE

Abramowitz, The Great Prisoners, 316 (1946) 30
47 Columbia Law Review, 416 (Note) (1947) ..13, 14, 15, 34n
47 Columbia Law Rev. 416 (1947).....30, 35, 38, 40n
Cushman, "Safeguarding Our Civil Liberties," 7-8 (1943) 30
26 Cong. Globe, 34th Cong., 3rd Sess. 439 et seq. 38
81 Cong. Rec. 3285 (1937) 36
83 Cong. Rec. 7567-7686 (1938) 33
84 Cong. Rec. 1098-1128 (1939) 33
86 Cong. Rec. 572-605 (1940) 33
87 Cong. Rec. 886-900 (1941) 33
88 Cong. Rec. 2282-2297 (1942) 33
89 Cong. Rec. 721-729 (1943) 33, 36
91 Cong. Rec. 10-14 (1945) 33
92 Cong. Rec. 7720-7728 (1946) 33, 36n
94 Cong. Rec. 2395 (1948)..... 15
94 Cong. Rec. 2483-2496 (1946) 33
94 Cong. Rec. 2413 (1948) 34n
94 Cong. Rec. 2487.....30, 34n
Eberling, "Congressional Investigations" 383 (1928) .. 40
Ehrmann, "The Duty of Disclosure in Parliamentary Investigation" 30
Federal Rules of Civil Procedure (18 U. S. C. Foll. § 687), Rule 37(b) 9
Gellerman, Martin Dies, c. 7 (1944).....14, 30
Gose "The Limits of Congressional Investigating Power"..... 38
60 Harvard Law Rev. 1193 (1947) 31
H. R. 4564, 80th Cong. 1st Sess. (1947) 34n
H. Report 2233, 78th Cong. 2d Sess. 9-13 (1946)..... 13
H. Report 2, 76th Cong., 1st Sess. 13 (1939)..... 15

PAGE

H. Report 2742, 79th Cong., 2nd Sess. 16 (1947)..... 15
H. Report 2277, 77th Cong. 2nd Sess. Minority Report (1942)..... 31
H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10 (January 3, 1945)..... 9
Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. § 347), Section 240(a)..... 9
Kahn, Hollywood on Trial (1948)..... 14
N. Y. Herald Tribune, March 14, 1948, p. 22, cols. 6-8 .. 30
New York Herald Tribune, April 19, 1948, p. 12, col. 3 .. 34n
N. Y. Times, Oct. 8, 1947, p. 7, col. 5..... 30
3 New York City Bar Ass'n. 93 (1948)..... 34n
Ogden, The Dies Committee, c. IV, et seq..... 30
R. S. § 103, as amended June 27, 1938, c. 594, 52 Stat. 942..... 9
R. S. § 859, as amended June 22, 1938, c. 594, 52 Stat. 943..... 10
2 U. S. C. § 192.....9, 18, 28, 37
11 U. of Chic. Law Rev. 1 (1944)..... 30
14 U. of Chic. Law Rev. 256 (Note) (1947)...15, 28, 30, 36, 40
15 U. of Chic. Law Rev. 442 (Note) (1948)..... 43
96 U. of Penn. Law Rev. 381 (Note) (1948).....15, 30, 40n
18 U. S. C. § 88..... 1
18 U. S. C. §§ 1-17, et seq..... 15
18 U. S. C. §§ 1-17, et seq. 34
28 U. S. C. § 634.....10, 12, 24, 25, 41, 42, 43
50 U. S. C. § 31.....15, 34
10 Washington Law Review 61, (1935)..... 38
8 Wigmore, Evidence § 2195, p. 80 (3 ed. 1940)..... 38, 42
Wyzanski "Standards for Congressional Investigation"..... 34n

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UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered March 18, 1948 (R. 656), affirming judgments of conviction of each of the petitioners in the United States District Court for the District of Columbia (R. 31-37).

Statement of the Matter Involved

The indictments herein (R. 2-6) charged each of 17 individual defendants with having committed two offenses: the felony of conspiring to commit offenses against and to defraud the government (18 U. S. C. § 88); the misdemeanor of personally committing a contempt of a Con-

gressional committee (2 U. S. C. § 192). The conspiracy count was dismissed by the trial Court at the conclusion of the trial (R. 589) and is not before this Court.

Both charges derived from an investigation of the Joint Anti-Fascist Refugee Committee (sometimes hereinafter referred to as "JAFRC") by the House Committee on Un-American Activities (sometimes hereinafter referred to as the "House Committee"). The investigation of the JAFRC by the House Committee was conducted pursuant to House Resolution 5, 79th Cong., 1st Sess. (1945) (hereinafter sometimes referred to as "the Resolution") wherein the House Committee was authorized to investigate "un-American propaganda activities" and "subversive and un-American propaganda" which "attacks the principle of the form of government as guaranteed by our Constitution" (Gov. Ex. 30, R. 205-207).[1] The Resolution also accorded the House Committee the power to summon witnesses and records.

The JAFRC, an unincorporated association, is a relief organization (R. 540-543) which was licensed by the President's War Relief Board (R. 303, 328). The petitioners herein are members of the Executive Board of the JAFRC. The Board was originally comprised of 18 members (Gov. Ex. 36-C, R. 544-545), with Dr. Barsky as Chairman of the JAFRC Executive Board (R. 422) and Helen R. Bryan as Executive Secretary (R. 106).

On December 1, 1945, Ernie Adamson, Chief Counsel of the House Committee, wrote to the JAFRC in a letter

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[1] House Resolution 5 amended the Rules of the House of Representatives to constitute the House Committee a standing committee. 91 Cong. Rec. 10, 15 (1945). The House Committee was originally established in 1938 as a temporary committee. H. Res. 282, 75th Cong., 3d Sess. (1938). It presently operates, as the first permanent standing investigating committee in American history, under the Legislative Reorganization Act of 1946. Pub. L. 601, 79th Cong., 2d Sess., § 121(b)(1)(q) (1946). The scope of the investigatory power of the House Committee has been the same from its inception to date. H. Res. 26, 76th Cong., 1st Sess. (1939); H. Res. 321, 76th Cong., 3d Sess. (1940); H. Res. 90, 77th Cong., 1st Sess. (1941); H. Res. 420, 77th Cong., 2d Sess. (1942); H. Res. 65, 78th Cong., 1st Sess. (1943).

addressed to Dr. Barsky requesting that a "convenient date" be fixed "when our investigators can call at your office and make a preliminary investigation of your records" (Gov. Ex. 27, R. 214). At the time this letter was sent, the House Committee had no sworn testimony in its files concerning the JAFRC (R. 326), but apparently acted on the basis of the following: (1) a letter dated January 14, 1944 from William Loeb, a newspaper publisher, to the President's War Relief Control Board urging that the JAFRC not be granted membership in the National War Fund because he had the "sincere belief" that the JAFRC "is not an American group" (Gov. Ex. 1 at p. 607-a, R. 318-319) and, according to Congressman Wood, an oral request by War Relief Control Board officials to investigate the JAFRC (R. 326-327)[2]; (2) unidentified letters and post cards "complaining of this organization" (R. 326, 332-333, 349); and (3) information allegedly obtained from the State Department that the JAFRC had applied for transit visas through the United States to Mexico for "outstanding Communists"[3] (R. 338-341) and the "assumption" that those refugees would stay in the United States if granted such visas (R. 353-354). Dr. Barsky responded on December 5, 1945 that the letter of Mr. Adamson would be submitted to an emergency meeting of the Executive Board "and I will advise you promptly of its decision" (Gov. Ex. 28, R. 215).

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[2] The War Relief Control Board continued to license the JAFRC until the Board ceased to exist although the House Committee requested the revocation of that license (R. 328-329).

[3] Government witness Robert C. Alexander, Assistant Chief, Visa Division, State Department, was unable to recall any specific cases where the JAFRC had applied for a transit visa for a refugee (R. 266, 291). He testified that one member of the Executive Board, aided by a letter from Helen Bryan, applied for a visa for his brother Bela Lustig and that application was not approved (R. 266, 286). Ruth Leider, a member of the Executive Board, represented several visa applicants as an attorney and although Mr. Alexander originally testified that no favorable action was taken in any of those cases, he could not cite any instances where an applicant represented by Ruth Leider was denied a visa and "revised" his testimony when confronted with 14 cases in which applicants she had represented were approved by the State Department (R. 554).

On December 4, 1945, before the reply of Dr. Barsky was received by the House Committee, the House Committee issued a document which by its terms commanded the Sergeant at Arms to summon Helen Bryan or Dr. Barsky to testify before it on December 19th and to produce at that time "all books, records, papers and documents" concerning JAFRC receipts and disbursements "and all letters, memoranda or communications from, or with, any person or persons outside of the United States" (Gov. Ex. 25, R. 221-222). Helen Bryan was served with the aforesaid summons by a clerk of the House Committee on December 14 (R. 217, 222). On that same day the JAFRC Executive Board met and instructed Helen Bryan and Dr. Barsky, by resolution, to advise with counsel and to "take any additional steps necessary and pursue all means to maintain and protect the rights" of the JAFRC "from the unjustified attack" on the JAFRC by the House Committee "which we consider constitutes a threat to democratic procedure in the United States" (Gov. Ex. 36-A, R. 540-542).

Helen Bryan appeared before the House Committee on January 24, 1946 (R. 223, 227) and did not produce the summoned records (R. 106-108). She was not permitted to make or leave with the House Committee a statement of the reasons for the non-production of those books and records or a prepared detailed statement of the JAFRC activities (R. 108-110).

The following day a subpoena to Dr. Barsky was issued by Congressman Wood, as Chairman of the House Committee, to appear on January 30, 1946 to testify and to bring with him all records indicating all contributors to and disbursements by the JAFRC in 1944 and 1945, and all correspondence received and sent by the JAFRC from and to outside the United States (Gov. Ex. 23, R. 223-225). This subpoena was served on January 28, 1946 (R. 225) and Dr. Barsky appeared on the adjourned date of Febru-

ary 13, 1946 (Gov. Ex. 2, R. 421-434). Two days prior to his appearance, five members of the Executive Board met[4] and a resolution was adopted[5] re-iterating that the JAFRC cannot "be considered Un-American, subversive, or an attack upon the principles of our form of government" and instructing Dr. Barsky not to produce the summoned books and records (Gov. Ex. 36-B, R. 542-544). At the hearing before the House Committee Dr. Barsky was questioned and testified. He stated that he could not produce the summoned books and records since he did not have custody or possession thereof (R. 427-430), and he further indicated that the JAFRC could not be considered "a fit committee for investigation by any committee to investigate un-American activities" (R. 431).

Although neither Helen Bryan nor Dr. Barsky was questioned by the House Committee as to the activities of the JAFRC or permitted to make any statement describing those activities, several other witnesses were.

Miss Martha E. Mitchell appeared in executive session before the House Committee on January 23, 1946 and testified as to her experiences in Spain in 1937 with the American Unit Hospital established there on behalf of the Loyalists and under the supervision of Dr. Barsky (Gov. Ex. 1, R. 41-99). In connection with her testimony, a series of newspaper articles by Frederick Woltman, which appeared in 1941 based upon information from Miss Mitchell, was received by the House Committee (R. 65-85). Since the JAFRC was not formed until March, 1942 (R. 423), Miss Mitchell could provide no information as to the JAFRC but did testify as to Dr. Barsky.[6]

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[4] Dr. Barsky, Dr. Jacob Auslander, Mrs. Ruth Leider, Manuel Magana, and Prof. Lyman R. Bradley.

[5] The minutes of the meeting indicate that 7 other members of the Board voted in absentia: Howard Fast, Mrs. Marjorie Chodorov, Leverett Gleason, Harry M. Justiz, Mrs. Samuel Kamsly, Mrs. Charlotte Stern and Dr. Jesse Tolmach.

[6] Miss Mitchell was not produced for cross examination. Her testimony before the House Committee was admitted at the trial over objections (R. 296, 298).

On February 15, 1946 the House Committee heard Mr. Alexander of the Visa Division of the State Department (Gov. Ex. 3, R. 245-258). Mr. Alexander acknowledged his unfamiliarity with the JAFRC relief activities (R. 256) and could testify specifically to only one fact, *i. e.*, a visa was denied to the brother of James Lustig (R. 248-250).[7]

The House Committee also received, sometime after January 23, 1946, a letter from J. Edgar Hoover, Director of the Federal Bureau of Investigation. The letter recited that in September, 1945, the JAFRC had used sound trucks in New York City to raise funds, urging the severance of diplomatic relations with Spain and referring to "labor controversies then current in the New York City area" (Gov. Ex. 4, p. 854, R. 306-307).

Upon the foregoing information,[8] and subsequent to the appearances of Helen Bryan and Dr. Barsky, the House Committee on March 29, 1946 issued 16 individual mandates addressed to the Sergeant At Arms, or his Special Messenger, to summon 16 named persons to appear and testify before the House Committee on April 4, 1946 (Gov. Exs. 7 through 22). The parties to be summoned were all the members of the JAFRC Executive Board except Dr. Barsky and John T. McManus.[9] Each mandate further instructed the Sergeant At Arms to bring with him all books and records of the JAFRC from January 1, 1945 to April 4, 1946 concerning JAFRC receipts and disbursements, and JAFRC correspondence with persons in foreign countries during that same period (R. 228-229). Service was made on the members of the Board named in the mandates: eight of the petitioners were served on March 29,

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[7] Mr. Alexander also gave the House Committee his opinion, based mainly on hearsay, as to the political orientation of the JAFRC and several of its members. This testimony was seriously undermined upon the cross examination of Mr. Alexander at the trial (R. 547-554; see also R. 260-282, 290-294).

[8] Congressman Wood also testified that he had seen a book written by one of the JAFRC Executive Board about Tito "in which he made the statement in the book that this organization financed the return of Mr. Tito" (R. 327).

[9] John T. McManus was never otherwise summoned by the House Committee.

1946 (R. 134, 136, 137, 142, 146, 153, 156-157, 161-162); one was served on April 1 (R. 151); and another was served on April 3 (R. 167). One mandate named the JAFRC and was served on Helen Bryan on March 29 (R. 181).

All the petitioners, except Dr. Barsky, and five other members of the Executive Board appeared on April 4. Each of them took the oath administered by the chairman and testified (Gov. Ex. 6, R. 400) but did not produce the books and records (R. 230). The witnesses uniformly indicated that Helen Bryan had custody and control of the documents sought and was responsible for the production or non-production thereof. Helen Bryan also appeared that day (R. 230) and refused to produce the books and records (Gov. Ex. 6, p. 103). In a written statement which she sent to the Committee she informed the Committee that she considered that it had no constitutional right to the books and records and that the production thereof would publicize recipients of JAFRC funds and "put in jeopardy the lives of those members of their families who are at the mercy of the Franco dictatorship" (Gov. Ex. 6, pp. 103-105).

On March 31 of the next year, 1947, all the members of the JAFRC Executive Board except John T. McManus were indicted by the Grand Jury on two counts as aforesaid: for an alleged conspiracy; and for an alleged contempt, after having been cited by the House of Representatives for their alleged willful and deliberate refusal to produce the aforementioned books and records.

Thereafter each of the indicted parties pleaded not guilty to both counts of the indictment (R. 6-10).

A motion to dismiss the indictment on constitutional and other grounds (R. 17) was denied on May 21, 1947 by Judge HOLTZOFF with an opinion (R. 614-624).

The trial, with Judge RICHMOND B. KEECH presiding, began on June 13, 1947[10] (R. 115). The jury heard the evidence, except that the testimony submitted to prove that the books and records sought were pertinent to a "matter under inquiry before" the House Committee (2 U. S. C. § 192) was heard by Judge KEECH out of the presence of the jury (R. 231). The trial Judge held and charged the jury that the books and records sought were pertinent to the matter under inquiry[11] and that the House Committee had a reasonable basis to investigate the JAFRC (R. 607).

On June 26, 1947, at the close of the entire case, Judge KEECH directed a verdict of not guilty as to all sixteen defendants on the first count of the indictment, the conspiracy count, for lack of evidence (R. 589).

On June 27, 1947, the jury gave as ordered a verdict of not guilty as to all defendants on the first count (R. 604, 31); but the jury found all the defendants guilty on the second count (R. 31). The defendants promptly made a motion for a new trial or for judgment of acquittal (R. 37) which was denied on July 11, 1947 (R. 40).

Fifteen of the defendants were each sentenced to three months' imprisonment and fined $500.00 (R. 32-37); Dr. Barsky was sentenced to six months' imprisonment and fined $500.00 (R. 31). The trial Court suspended the sentences of five of the aforesaid defendants; those five paid their respective fines and are not before this Court. The other eleven, petitioners herein, were released on bail of $500.00 each pending appeal (R. 31-37).

The cause was argued before the United States Court of Appeals for the District of Columbia on November 24, 1947. On March 18, 1948, the convictions were affirmed by a divided court (R. 656). A petition for rehearing was there-

[10] Upon the trial sixteen members of the Executive Board were defendants; one member was abroad at that time.

[11] The books and records themselves were never examined by the trial Court although petitioners offered those books and records for inspection (R. 233).

after filed by petitioners and denied on March 29, 1948 (R. 657). The mandate was stayed by order of the Court of Appeals until April 29, 1948 pending filing of this petition.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. § 347); Federal Rules of Criminal Procedure, Rule 37(b) (18 U. S. C. foll. § 687).

Statutes and Resolutions Involved

1. 2 U. S. C. § 192; R. S. § 103, as amended June 27, 1938, c. 594, 52 Stat. 942.

> *Refusal of witness to testify.* Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refused to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2. H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (January 3, 1945).

> Resolved, That the rules of the Seventy-eighth Congress be, and they are hereby, adopted as the rules of the Seventy-ninth Congress.
>
> That rule X of the Rules of the House of Representatives is amended by adding after clause 40a of the first paragraph a new clause to read as follows:

'40b. On Un-American Activities, to consist of nine members.'

Rule XI of the Rules of the House of Representatives is amended by adding after clause 40a two new clauses to read as follows:

'40b. To Un-American Activities—to the Committee on Un-American Activities.

'40c. The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

'The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

'For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the Committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.'

3. 28 U. S. C. § 634; R. S. § 859, as amended June 22, 1938, c. 594, 52 Stat. 943.

No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

Questions Presented

1. Whether the Resolution as construed and applied herein abridged the freedom of speech, press and assembly of petitioners in violation of the First Amendment to the Constitution of the United States (R. 17, 611).

2. Whether the Resolution, on its face, authorized the House Committee to abridge the freedom of speech, press and assembly of petitioners thereby violating the First Amendment to the Constitution of the United States (R. 17, 611).

3. Whether the Resolution, on its face and as construed and applied by the House Committee, acts as a prior restraint upon speech, press and assembly in violation of the First Amendment to the Constitution of the United States (R. 17, 611).

4. Whether the Resolution, on its face and as construed and applied by the House Committee, invests the House Committee with powers not delegated to the Congress by the Constitution of the United States in violation of the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States (R. 17, 611).

5. Whether the Resolution failed to provide petitioners with an ascertainable standard of guilt, whereby petitioners

could determine, in advance, whether they were committing contempt by the non-production of the books and records summoned in violation of the Fifth and Sixth Amendments to the Constitution of the United States (R. 17, 611).

6. Whether the petitioners made a wilful default in production of books and records within the meaning of Title 2, Section 192 of the United States Code (R. 562, 611).

7. Whether it was error to admit in evidence the testimony of the petitioners before the House Committee in violation of Title 28, Section 634 of the United States Code (R. 38, 560).

8. Whether the trial Court erred in finding and charging[12] the jury that the records summoned were pertinent to the matter under inquiry and erred in excluding[13] certain evidence submitted by petitioners as to the lack of pertinency of those records (R. 38, 611).

9. Whether the trial Court erred in charging[14] the jury that compliance with the alleged subpoenas duces tecum was obligatory for each petitioner who "alone or in concert . . . had custody or control over such records" and in refusing petitioners' charge[15] (R. 18, 38, 561, 611).

10. Whether the trial Court erred in submitting the issue of aiding and abetting to the jury and in the charge[16] given with respect to that issue (R. 39, 626).

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[12] The charge appears at R. 607.

[13] The evidence was excluded at R. 233, 356, 364-365, 367-369.

[14] The charge appears at R. 610.

[15] The charge requested by petitioners appears at R. 598.

[16] The charge appears at R. 610.

Reasons Relied on for Allowance of the Writ

1. The United States Court of Appeals for the District of Columbia, by a divided Court, has decided a question of foremost importance, relating to the construction of the Resolution creating the House Committee and of the First, Fifth, Sixth, Ninth and Tenth Amendments to the United States Constitution as they pertain to that Resolution and the House Committee, which question has not been, but should be settled by this Court. This is an appropriate case for this Court to decide the constitutional questions raised by the Resolution and urged upon this Court's consideration by the dissent of EDGERTON, *J.* (R. 651). The charged default occurred at a point beyond which petitioners could not comply without forfeiting constitutional rights. *Smith* v. *Cahoon,* 283 U. S. 553 (1931); *Lovell* v. *Griffin,* 303 U. S. 444 (1938); see *Jones* v. *Opelika,* 316 U. S. 584, 600, 602 (1942).

2. The United States Court of Appeals for the District of Columbia held that petitioners' rights under the First Amendment could be impaired by the House Committee investigation authorized by the Resolution, although no clear and present danger to justify such abridgement was shown or exists, on the ground that "some reasonable cause for concern" appears (R. 636). This decision is in conflict with the applicable decisions of this Court. The investigation authorized by the Resolution abridges the speech and expression which is the subject matter of that investigation. The Resolution on its face, and by incorporation of the House Committee construction and practices by the annual re-enactment of the Resolution since 1938, invests the House Committee with unlimited power to investigate the opinions and expressions of individuals and organizations (Note, 47 *Columbia Law Rev.* 416, 418 (1947)); to investigate the principal media of communication including radio (see, *e. g.,* H. Report 2233, 79th Cong. 2d Sess. 9-13 (1946)),

the universities (*Gellerman, Martin Dies*, c. 7 (1944)), and the motion pictures (*Kahn, Hollywood on Trial* (1948)); to act as a "'grand jury' . . . in session to investigate un-American activities at all times" (91 Cong. Rec. 275 (1945)); and to try in the public press and to punish by notoriety and by economic and political sanctions those the House Committee considers "subversive" or "un-American" (Note, 47 *Columbia Law Rev.* 416, 418-419, 427-428 (1947)). The abridgement of speech, press and assembly by the House Committee is no incident or by-product of an investigation into a matter proper for Congressional inquiry; it is the actual and intended effect of the investigation authorized by the Resolution. The proper constitutional standard for the Resolution is the clear and present danger test.

3. The United States Court of Appeals for the District of Columbia held that "there was justification here . . . for the exercise of the power of inquiry" sufficient to warrant the abridgement of petitioners' rights under the First, Fifth, Ninth and Tenth Amendments to the United States Constitution (R. 637). This decision is in conflict with the applicable decisions of this Court.

a. There is no constitutionally sufficient justification for the inquiry since it abridges speech, press and assembly which create no clear and present danger. The applicable decisions of this Court establish that the security and safety of the state are threatened rather than safeguarded by abridgements of speech, press and assembly which do not create a clear and present danger. *Stromberg* v. *California*, 283 U. S. 359, 369 (1931); *Near* v. *Minnesota*, 283 U. S. 697, 721 (1931); *DeJonge* v. *Oregon*, 299 U. S. 353, 365 (1937); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636 (1943).

b. The investigatory power of Congress does not provide a constitutionally sufficient justification for the in-

quiry authorized and conducted under the Resolution. The investigatory power is an auxiliary power incidental to the Congressional power. *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613 (1929); *McGrain* v. *Daugherty*, 273 U. S. 135, 173 (1927); *Jurney* v. *MacCracken*, 294 U. S. 125, 147 (1935); *Marshall* v. *Gordon*, 243 U. S. 521, 541 (1917); *Sinclair* v. *United States*, 279 U. S. 263, 291 (1929); *In re Chapman*, 166 U. S. 661, 667 (1897); *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376, 388 (1928). An investigation into the private affairs of private citizens is void for want of jurisdiction under the Ninth and Tenth Amendments to the Constitution of the United States if it is not plausibly related to prospective valid legislation. *Kilbourn* v. *Thompson*, 103 U. S. 168, 193, 196 (1881); cf. *Marshall* v. *Gordon*, 243 U. S. 551 (1917). The gap between the federal statutes applicable to the area into which the House Committee is purportedly inquiring (18 U. S. C. §§ 1-17, 21-39, 51-61, 71-151; 50 U. S. C. § 31) and the constitutional limits to legislation in that area is too narrow to justify the extensive inquiry into opinion and expression authorized by the Resolution. A decade of investigation by the House Committee has not yielded any valid legislation resulting from recommendations by the House Committee. 94 Cong. Rec. 2495 (1948); Notes, 96 *U. of Penn. Law Rev.* 381, 396 (1948); 14 *U. of Chic. Law Rev.* 256, 259 (1947); 47 *Columbia Law Rev.* 416, 427 (1947). The House Committee itself considers its function to be "exposure" rather than the production of valid legislation. H. Report 2, 76th Cong., 1st Sess. 13 (1939); H. Report 1, 77th Cong., 1st Sess. 24 (1941); H. Report 2742, 79th Cong., 2nd Sess. 16 (1947).

4. The United States Court of Appeals for the District of Columbia held that "the power of inquiry was validly delegated by the Congress to the Committee" because irrespective of the vagueness of the clause of the Resolution authorizing the House Committee to investigate "un-

American propaganda activities," the clause authorizing the House Committee to investigate " 'subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution' . . . is definite enough" (R. 637-638). This decision is in conflict with the applicable decisions of this Court. Irrespective of whether the Resolution is definite enough as a delegation of power, the power delegated is so vague and indefinite as to permit the impairment "of incidents fairly within the protection of the guarantee of free speech" and "is void, on its face, as contrary to the [First] Amendment". *Winters* v. *New York*, 16 U. S. Law Week 4279 (decided March 29, 1948). A statute so vague and indefinite that it extends to speech which may not be impaired as well as speech which may be abridged is a prior restraint on all speech in violation of the First Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940); *Carlson* v. *California*, 310 U. S. 106, 111 (1940); *Thomas* v. *Collins*, 323 U. S. 516, 534, 541 (1945); *Winters* v. *New York*, 16 U. S. Law Week 4279 (1948); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931).

5. The United States Court of Appeals for the District of Columbia held the Resolution constitutional although not on its face directly and exclusively concerned with such activities as may be constitutionally restricted on the grounds that the Resolution is not a penal statute (R. 638). This decision is in conflict with the applicable decisions of this Court. The Resolution is enforceable, and is here being enforced, by penal sanctions and is to be treated as any other penal statute. *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946). The requirement that legislative acts abridging speech must be limited to speech which may constitutionally be impaired applies not only to statutes which define crimes but also to legislative acts which confer

upon an agency of government the power to abridge expression. *Hannegan* v. *Esquire*, 327 U. S. 146 (1946); *Ex parte Endo*, 323 U. S. 283, 298-300 (1944); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *United States* v. *Ballard*, 322 U. S. 78 (1944); *Bridges* v. *California*, 314 U. S. 252 (1941).

6. The United States Court of Appeals for the District of Columbia held that the Resolution provided petitioners with an adequate standard of guilt in that "the question addressed to these appellants was pertinent to the subject . . . of the resolution" (R. 638). This decision is in conflict with the applicable decisions of this Court. The terms used in the Resolution and relied upon by the United States Court of Appeals for the District of Columbia have no fixed or definite meaning. *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *Winters* v. *New York*, 16 U. S. Law Week 4279, 4282 (1948); cf. *Musser* v. *State of Utah*, 333 U. S. 95 (1948). The Resolution violates the Fifth and Sixth Amendments in that it exposed petitioners to criminal sanctions without providing petitioners, in advance, with fixed and definite standards whereby petitioners could ascertain what acts would constitute the crime of contempt. *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *United States* v. *Reese*, 92 U. S. 214 (1875). The subsequently determined pertinency of the demand made upon petitioners does not supply the Resolution with an adequate standard of guilt. Irrespective of whether the crime charged is judicially determined to be clearly within the statute defining the crime, the statute "violates an accused's rights under procedural due process" if the statute fails "to give fair notice of

what acts will be punished" (*Winters* v. *New York*, 16 U. S. Law Week 4279 (1948)) to "men of common intelligence" (*Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926)).

7. The United States Court of Appeals for the District of Columbia held that the remedy for the abuses committed by the House Committee under the Resolution upon constitutionally guaranteed rights and liberties of persons and organizations investigated by the House Committee "is for Congress, or for the people; it is political not judicial" (R. 640-641). This decision is in conflict with the applicable decisions of this Court. The failure to draft a narrowly drawn Resolution which would interdict such abuses in the administration of the Resolution constitutes the Resolution a violation of the First Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88, 97, 105 (1940); *DeJonge* v. *Oregon*, 299 U. S. 353, 364 (1937); *Carlson* v. *California*, 310 U. S. 106, 112 (1940); *Lovell* v. *Griffin*, 303 U. S. 444, 450 (1938); *Schneider* v. *Irvington*, 308 U. S. 147, 162 (1939). Relief from invasions of constitutionally guaranteed civil rights is not confined to the Congress. Minority groups affected by the House Committee, unable as minorities to obtain relief from the Congress, can invoke this Court's power to review Congressional action which impairs their civil liberties. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943); cf. *Chambers* v. *Florida*, 309 U. S. 227, 238 (1940). Judicial relief from Congressional action which abridges speech, press and assembly is necessary to make available the channels whereby legislative relief may ultimately be obtained. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938).

8. The United States Court of Appeals for the District of Columbia held that petitioners committed a "wilfull" default within the meaning of Title 2, Section 192 of the United States Code although no specific criminal intent

was shown (R. 642). This decision is in conflict with the applicable decisions of this Court. The term "wilfull," in the context of the vague language of the Resolution, requires a specific criminal intent. *Screws* v. *United States,* 325 U. S. 91 (1945); *Hartzel* v. *United States,* 322 U. S. 680 (1944). Petitioners, having acted in bona fide reliance upon advice of counsel and upon the honest and reasonable belief that the Resolution was unconstitutional, have not committed a "wilfull" default. *Keegan* v. *United States,* 325 U. S. 478 (1945); *United States* v. *Murdock,* 290 U. S. 389 (1933).

9. The United States Court of Appeals for the District of Columbia has erroneously decided a question of substance relating to the construction of Section 634, Title 2 of the United States Code which has not been, but should be, settled by this Court (R. 643).

10. The United States Court of Appeals for the District of Columbia has erroneously decided a question of general importance relating to the obligation of members of an unincorporated relief association to produce, in response to subpoenas *duces tecum* addressed to the members individually, organization books and records not in their custody or possession. The ruling of the trial Court (R. 610), affirmed by the Court of Appeals (R. 642), required compliance of each petitioner who "alone or in concert . . . had custody or control over such records." It has consistently been held that a subpoena *duces tecum* need be complied with only where actual custody is had of the documents requested; a party thus subpoenaed need not "sue and labor" to obtain books and records he does not possess. *Amey* v. *Long,* 9 East 473 (K. B. 1808); *Munroe* v. *United States,* 216 Fed. 107 (C. C. A. 1, 1914); *In re Ironclad Mfg. Co.,* 201 Fed. 66 (C. C. A. 2, 1912); *United States* v. *American Tobacco Co.,* 146 Fed. 557 (S. D. N. Y. 1906); *In re Sykes,* 23 Fed. Cas. 13,707 (S. D. N. Y. 1878); *Russell* v. *McLellan,* 21 Fed. Cas. 12,158 (D. Me. 1847); *Commonwealth* v. *International Harvester Co.,* 148 Ky. 37,

145 S. W. 1132 (1912); see *Brown* v. *United States,* 276 U. S. 134, 142 (1928). The extension of the foregoing principle introduces uncertainty and the possibility of "shotgun" techniques into a field heretofore clearly and simply understood. The dictum of this Court in *Wilson* v. *United States,* 221 U. S. 361, 374, 376 (1911), relied upon by the United States Court of Appeals for the District of Columbia, has never been and should not be extended to the members of an unincorporated association or to a process which issues *ex parte* such as a subpoena *duces tecum.* Cf. *Commissioners* v. *Sellew,* 99 U. S. 624 (1879).

11. The United States Court of Appeals for the District of Columbia held (R. 643) that the trial Court was correct in submitting to the jury the issue of aiding and abetting, and was correct in its charge as to that issue (R. 610). This decision is in conflict with the applicable decisions of this Court. Aiding and abetting was not charged in the indictments (R. 2-6), it was not part of the prosecution or defense, and it was not in the Government's prayer for instructions (R. 595-597). The issue of aiding and abetting should therefore not have been submitted to the jury. *Cole* v. *Arkansas,* 16 U. S. Law Week 4215 (decided March 8, 1948); *DeJonge* v. *Oregon,* 299 U. S. 353, 362 (1937). Upon submission of the issue, the jury should have been charged that the aider cannot be guilty unless there is a principal who has committed the substantive crime. *United States* v. *Howitt,* 328 U. S. 189 (1946); *Yenkichi Ito* v. *United States,* 64 F. (2) 73 (C. C. A. 9, 1933) *cert. den.* 289 U. S. 762 (1933). As the issue was left with the jury, petitioners may have been convicted for aiding and abetting although none of them committed the alleged contempt; for aiding and abetting Helen Bryan although the commission of the crime by her was not here charged or proven; or for aiding and abetting Dr. Barsky when he testified on February 13, 1946, although it was not charged (R. 5) that he committed the crime of contempt upon that date.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No.

EDWARD K. BARSKY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinions of the District Court are reported at 7 F. R. D. 38 (1947) (R. 14-17); 72 Fed. Supp. 58 (1947) (R. 614-624); and 72 Fed. Supp. 165 (1947) (R. 23-31). The opinion of the United States Court of Appeals for the District of Columbia (R. 632-655) is unreported.

Jurisdiction

The bases for this Court's jurisdiction are set forth in the petition (p. 9).

Specifications of Errors

1. The United States Court of Appeals for the District of Columbia erred in failing to reverse the convictions of

petitioners upon the ground that the Resolution is unconstitutional.

2. The United States Court of Appeals for the District of Columbia erred in failing to reverse the conviction of petitioners upon the ground that the trial Court improperly admitted into evidence the testimony of petitioners before the House Committee.

3. The United States Court of Appeals for the District of Columbia erred in failing to reverse the conviction of petitioners upon the ground that the trial Court improperly excluded evidence offered by petitioners as to the pertinency of the books and records summoned.

4. The United States Court of Appeals for the District of Columbia erred in failing to reverse the convictions of petitioners upon the grounds that the indictment failed to state an offense against the United States; that the proof failed to establish the commission of such an offense; and that the trial Court improperly charged the jury.

The specifications of error are set out in detail in the questions presented in the petition.

Summary of Argument

The argument in this brief is confined to the reasons why this Court should hear and decide the constitutional questions presented and the question presented as to Section 634 of Title 28 of the United States Code. The reasons urged with respect to the other issues are set forth in the petition.

Petitioners have standing to challenge the unconstitutionality of the Resolution. The purpose and effect of the Resolution is not inquiry preparatory to legislation but the abridgement of freedoms guaranteed by the First Amendment to the United States Constitution. This is

accomplished by authorizing the House Committee to inquire into, to compel public disclosure of, and to stigmatize individuals and organizations for their opinions and expressions. As construed and applied to petitioners, the Resolution impaired petitioners' constitutional right to be free from such inquiry, disclosure and stigmatization for their views and speech. The abridgement of the rights of petitioners and others by the Resolution violates the First Amendment since the matter which is made the subject of investigation presents no clear and present danger to a paramount public interest. The investigation does not serve a paramount public interest constitutionally sufficient to warrant the abridgements authorized by the Resolution. Even if the House Committee investigation includes matters which may constitutionally be abridged by inquiry, still the Resolution violates the First Amendment since it is so vague that, on its face and on the record herein, the Committee is authorized to and does investigate and abridge opinion, speech, press and assembly investigation of which does not serve any paramount public interest. The vagueness of the key terms of the Resolution also deprives petitioners of rights under the Fifth and Sixth Amendments to the United States Constitution in that the Resolution did not provide them with adequate standards whereby petitioners could determine in advance whether the non-production of the documents demanded constituted the crime of contempt. And the Resolution, as an investigation into the private affairs of private persons, violates the Ninth and Tenth Amendments to the United States Constitution in that it is not plausibly related to prospective valid legislation as required by *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881). The admission of petitioners' testimony before the House Committee at the trial was prejudicial error. Section 634 of Title 28, United States Code, expressly interdicts the use of the testimony of a witness before a Congressional committee in a subsequent criminal proceeding.

ARGUMENT

I

The United States Court of Appeals for the District of Columbia has decided a question of general importance, relating to the construction of the Constitution and of the Resolution, which has not been, but should be, settled by this Court.

This Court has heretofore stricken down local, desultory and minor inhibitions of rights guaranteed by the Bill of Rights lest precedents be established to sanction more serious inhibitions. Now this Court is confronted with a Resolution imposing endemic restrictions, epidemic in scope, upon civil liberties. This case involves not only the loss of liberty and livelihood by the eleven petitioners,[1] but a permanent-session inquisition into the opinions and speech of individuals and organizations of every conceivable political, economic, religious, racial and social orientation. "Nothing can be more repugnant to the true genius of the common law than such an inquisition as has been mentioned into the consciences of men . . ." (Alexander Hamilton, quoted at *Cummings* v. *Missouri*, 71 U. S. 277, 331 (1867)). To the restraints upon opinion and expression occasioned by inquisition under the Resolution, the House Committee has added the technique of trying and convicting in the public press—without judicial trial or safeguards—those it finds guilty of harboring "un-American" or "subversive" views thus substituting ". . . for the established and legal mode of investigating crimes and inflicting forfeitures, one that is unknown to the Constitution, and repugnant to the genius of our law" (*id.*, at 332). The validity

[1] The petitioners are comprised of three physicians; two lawyers; two educators; one author; one labor leader; one merchant; and one housewife (R. 564-571, 575-578, 581-584).

of the Resolution which authorizes all of the foregoing is put in issue in the instant prosecution.

Petitioners have standing to raise every aspect of the constitutionality of the Resolution.

In response to the mandates issued by the House Committee, petitioners appeared, took the oath, and answered questions asked of them (Gov. Ex. 6). The default charged occurred at that point at which compliance would have entailed a violation of petitioners' constitutional rights.[2] To have produced the books, records and correspondence sought would have been to disclose matters which petitioners had a constitutional right not to disclose (see pp. 29 to 32, *infra*). The investigation and this prosecution of petitioners by the House Committee are jurisdictionally premised upon the pertinency of the activities of petitioners and of the summoned books, records and correspondence to "propaganda activities" (R. 230, 235-240, 607). The House Committee Report of June, 1946 (Gov. Ex. 33 at pp. 18-73, R. 491), the questions asked petitioners at Committee hearings (Gov. Ex. 2, R. 421; Gov. Ex. 6, R. 400), and the Committee's interest in JAFRC correspondence, contributors and donees all indicate that petitioners were being investigated and the books, records and correspondence were demanded in order to compel public disclosure of petitioners' opinions, expressions, and associations and that the House Committee contemplated the "exposure" of petitioners in the public press for those views and expressions. Production of the documents demanded would not only have subjected petitioners to judicially irremediable consequences (*Hearst* v. *Black*, 87 F. (2) 68 (App. D. C. 1936); *Spalding* v. *Vilas*, 161 U. S. 483 (1896); *Mellon* v. *Brewer*, 18 F. (2) 168 (App. D. C. 1927), *cert. den.* 275 U. S. 530 (1927); *Cresson* v.

[2] Cf. *Josephson* v. *United States*, 165 F. (2) 82, 90 (C. C. A. 2, 1947) *cert. den.* 333 U. S. —— (decided on Feb. 16, 1948). The witness there refused to take the oath so that the witness may not have been confronted with the alternatives, presented to the petitioners here, of contempt and the immediate impairment of constitutional rights.

Louisville Courier-Journal, 299 Fed. 487 (C. C. A. 6, 1924)), but would have left petitioners with no opportunity to assert the claim that they were being deprived by the Committee of constitutional rights (see Note, 14 *U. of Chic. Law Rev.* 256, 263-269 (1947)). Petitioners were not obliged to forego their constitutional rights under the First, Fifth, Ninth and Tenth Amendments not to produce the documents in order to test the constitutionality of the Resolution. *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); see *Jones* v. *Opelika*, 316 U. S. 584, 600, 602 (1942).

The question of the constitutionality of the Resolution under the Fifth and Sixth Amendments to the United States Constitution is squarely raised by the facts in this case. This prosecution is for a failure by petitioners "to produce papers upon any matter under inquiry" (2 U. S. C. § 192) (R. 2-6). Petitioners were not required to produce the books and records demanded if those documents were not pertinent to the matter put under inquiry by the Resolution. *McGrain* v. *Daugherty*, 273 U. S. 135, 176 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929); *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 25 (1936). The demand made of petitioners necessitated a judgment by them, at the risk of committing the crime of contempt, as to the meaning of the terms "un-American," "subversive," and "the principle of the form of government as guaranteed by our Constitution."[3] Petitioners refused to produce the summoned books, records, and correspondence because, *inter alia*, they considered that the JAFRC ". . . is truly American in every sense of the word and can, by no stretch of the imagination, be considered Un-American,

[3] Compare *Josephson* v. *United States*, 165 F. (2) 82, 87-88 (C. C. A. 2, 1947) *cert. den.* 333 U. S. —— (1948), where it was held that the witness was not required to ascertain the meaning of the key terms of the Resolution in order to determine whether he was obliged to take the oath since the witness had no problem as to whether the oath he was asked to take was pertinent to "un-American propaganda activities."

subversive, or an attack upon the principles of our form of Government" (Gov. Exs. 36-A, 36-B, R. 541, 543). The petitioners were, therefore, required to and did make a determination as to the meaning of the terms of the Resolution and are here being persecuted for that determination. Under such circumstances, the question of whether those terms provided an adequate and ascertainable standard of guilt is raised here.

II

The Resolution Is Unconstitutional

The doctrine of the supremacy of law applies to Congressional investigations as well as to any other type of Congressional action. The Resolution establishing the House Committee, and the investigation conducted pursuant thereto, must conform with the Constitution and it is the function of the courts to determine whether such conformance obtains. *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881); *McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929).

A

The Resolution violates the First Amendment to the Constitution of the United States.

That the investigation into "propaganda activities" authorized by the Resolution and conducted by the House Committee abridges speech, press and assembly, including the freedom of speech of petitioners, is acknowledged by the majority and dissenting opinions of the Court of Appeals; nor is it disputed that the First Amendment limits the Congressional investigatory power. R. 639-640, 695; cf. *Colonial Sugar Refining Co.* v. *Attorney General*, 15

Commonwealth L. R. 182 (1912) *rev'd* L. R. [1914] App. Cas. 237; *Greenfield* v. *Russel,* 292 Ill. 392, 127 N. E. 102 (1920); see *Jones* v. *Opelika,* 316 U. S. 584, 600, 609 (1942).

Public inquiries into matters of opinion and expression protected by the First Amendment are prohibited by that Amendment.[4] *United States* v. *Ballard,* 322 U. S. 78 (1944), see *Cummings* v. *Missouri,* 71 U. S. 277, 331 (1867). As stated in the dissent of EDGERTON, *J.*, "No one denies that the inquest is an effective instrument of restraint" (R. 651). The House Committee inquiry, motivated by "sheer animosity and excited partisanship" (Ehrmann, "The Duty of Disclosure in Parliamentary Investigation" 11 *U. of Chic. Law Rev.* 1, 117, 150 (1944)) and conducted in a manner violative of procedural due process (see *Ogden, The Dies Committee,* c. IV, VIII, IX, XIII, XVII (2 ed. 1945); *Gellerman, Martin Dies,* c. 4, 5 (1944); *Cushman, Safeguarding Our Civil Liberties,* 7-8 (1943); 94 Cong. Rec. 2487, 2490, 2493, 2495 (1948); Notes, 96 *U. of Penn. Law Rev.* 381, 395 (1948); 14 *U. of Chic. Law Rev.* 256, 263 (1947); 47 *Columbia Law Rev.* 416, 428 (1947); *N. Y. Times,* Oct. 8, 1947, p. 7, col. 5 (RIFKIND, *J.*); *N. Y. Herald Tribune,* March 14, 1948, p. 22 cols. 6-8 (Archibald MacLeish)), is such "an effective instrument of restraint."

Compulsory public disclosure of constitutionally guaranteed opinion and expression is another aspect of the Committee's activities which is limited by the First Amend-

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[4] Prior to the adoption of the First Amendment, at the trial of Anne Hutchinson in 1637 before the General Court at Newton in the Province of Massachusetts-Bay, the following colloquy occurred:

> "*Gover.* Only I would add this. It is well discerned to the court that Mrs. Hutchinson can tell when to speak and when to hold her tongue. Upon the answering of a question which we desire her to tell her thoughts of she desires to be pardoned.
>
> *Mrs. H.* It is one thing for me to come before a public magistracy and there to speak what they would have me to speak and another when a man comes to me in a way of friendship privately there is difference in that."

(*Abramowitz, The Great Prisoners* 316 (1946).)

ment. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). The compulsory public disclosure of unorthodox opinions and speech is a patent restraint thereupon. Under the Resolution the House Committee not only restrains the unorthodox by compulsory disclosures but, also, restrains more orthodox views or speech by publicly characterizing any individual or organization[8] distasteful to the House Committee as "subversive," "un-American," or "communistic" (H. Report 2277, 77th Cong., 2nd Sess., Minority Report 4, 7 (1942)).

Speech is restrained and impaired if the speaker is subject to Congressional inquiry, to compulsory public disclosure, and to stigmatization because of his opinions and his speech.

Although the Resolution, on its face and as construed and applied herein, abridges speech, press and assembly, neither the expression which is the subject matter of the Resolution nor the expression or activities of the petitioners creates a clear and present danger to any substantive public interest (R. 636-637). Under such circumstances the Resolution violates the First Amendment. *Schenck* v. *United States*, 249 U. S. 47 (1919); *Bridges* v. *California*, 314 U. S. 252 (1941); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

It is immaterial that the Resolution does not in terms provide for "direct and candid efforts to stop speaking or publication as such." *Thomas* v. *Collins*, 323 U. S. 516, 547 (1945). "The House Committee's enabling Act concerns, specifically and exclusively, 'propaganda activities', and the Committee's principal purpose is to restrain them" (EDGERTON, *J.*, at R. 647). The decisions of this Court applying the clear and present danger test make no exception for

[8] See, *e. g.*, Gellhorn, "Report on a Report of the House Committee on Un-American Activities," 60 *Harvard Law Rev.* 1193 (1947).

abridgements by investigation.[6] It is the right impaired and not the limitation which requires that test to be applied. *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945).

The revenue power (*Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); *Grosjean* v. *American Press Company,* 297 U. S. 233 (1936)), the police power (*Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940)), the judicial injunctive and contempt power (*Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293 (1943); *Bridges* v. *California,* 314 U. S. 252 (1941)), the denaturalization power (*Schneiderman* v. *United States,* 320 U. S. 118 (1943); *Baumgartner* v. *United States,* 322 U. S. 665 (1944)), the deportation power (*Bridges* v. *Wixon,* 326 U. S. 135 (1945)), and even the power to preserve the safety of the Government (*Hartzel* v. *United States,* 322 U. S. 680 (1944); *Stromberg* v. *California,* 283 U. S. 359 (1931); *DeJonge* v. *Oregon,* 299 U. S. 353 (1937); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *Taylor* v. *Mississippi,* 319 U. S. 583 (1943)), are all limited by the rule that they may not constitutionally be employed to abridge any speech, press or assembly which creates no "grave and immediate danger to interests which the state may lawfully protect." *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943). The exception carved out by the United States Court of Appeals for the District of Columbia for the investigatory power creates "a blank spot in the protective covering"[7] of the Bill of Rights.

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[6] "To the general observation that an agency having authority to make an investigation may compel disclosure of all information relevant to the investigation, irrespective of the scope of the agency's regulatory power, an exception must be noted to the effect that when the purpose of compelling a disclosure is not to secure information for governmental purposes but is to use the power of compelling the disclosure as a sanction for producing a desired regulatory effect, the agency's action is necessarily limited by the scope of its regulatory power. If the agency may not regulate, it may not regulate by using publicity as a sanction." Davis, "The Administrative Power of Investigation," 56 *Yale Law J.* 1111, 1136 (1947).

[7] *Josephson* v. *United States,* 165 F. (2) 82, 93 (C. C. A. 2, 1947), *cert. den.* 333 U. S. —— (1948) (CLARK, *J.*, dissenting).

The exception cannot be justified on the grounds that the abridgement of constitutional rights is a tangential incident of Congressional investigation. Regulation of freedoms guaranteed by the First Amendment is the objective not a by-product of the Resolution. The Resolution was re-enacted without change annually after 1938 over objections to and criticisms of the House Committee practices (83 Cong. Rec. 7567-7686 (1938); 84 Cong. Rec. 1098-1128 (1939); 86 Cong. Rec. 572-605 (1940); 87 Cong. Rec. 886-900 (1941); 88 Cong. Rec. 2282-2297 (1942); 89 Cong. Rec. 721-729, 795-810 (1943); 91 Cong. Rec. 10-14 (1945); 92 Cong. Rec. 7720-7728 (1946); 94 Cong. Rec. 2483-2496 (1948)) so that the Committee practices have been incorporated into the Resolution. *Poe* v. *Seaborn*, 282 U. S. 101 (1930); *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110 (1939); *United States* v. *Cerecedo Hermanos y Co.*, 209 U. S. 337 (1908); *National Lead Co.* v. *United States*, 252 U. S. 140 (1920); *Boehm* v. *Commissioner of Internal Revenue*, 326 U. S. 287 (1945); *Douglas* v. *Commissioner of Internal Revenue*, 322 U. S. 275 (1944); *Merchants National Bank* v. *Commissioner of Internal Revenue*, 320 U. S. 256 (1943). Consequently, the considerations which may obtain where a Congressional committee incidentally inquires into matters of opinion and expression in the course of an investigation preparatory for legislation are not here involved since the history of the House Committee, which has been infused into the Resolution, reveals that the House Committee is investigating "propaganda activities" not as a preface to legislation but for the purpose of fixing and enforcing standards of political, economic and social orthodoxy in violation of the First Amendment. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Thomas* v. *Collins*, 323 U. S. 516, 544, 545 (1945).

Nor are the abridgements caused by the House Committee necessary incidents of Congressional investigation. Any need for Congress to inquire ". . . to discover

whether there is clear and present danger, could be authorized[8] and could be conducted[9] without violating the First Amendment" (EDGERTON, *J.*, at R. 651).

Even the objective of the House Committee investigation as construed by the United States Court of Appeals for the District of Columbia (R. 637) is not constitutionally sufficient to counter-balance "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945). The impairment by the House Committee investigation of speech, press and assembly which threaten no clear and present danger is a greater jeopardy to the security and stability of the nation than the views and expressions investigated. *Stromberg* v. *California,* 283 U. S. 359, 369 (1931); *Near* v. *Minnesota,* 283 U. S. 697, 721 (1931); *DeJonge* v. *Oregon,* 299 U. S. 353, 365 (1937); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 636 (1943). Any actual, attempted or potential threat to the national security caused by the "propaganda activities" investigated by the House Committee is already the subject matter of adequate police investigation and criminal sanctions. 18 U. S. C. §§ 1-17, 21-39, 51-61, 71-151; 50 U. S. C. § 31.

The United States Court of Appeals for the District of Columbia held "no more than that" Congress could authorize the House Committee "to make an inquiry of an individual which may elicit the answer that the witness is a believer in Communism or a member of the Communist Party" (R. 641). But no such inquiry was here made nor was the issue presented to the Court of Appeals in terms of such an inquiry. The Resolution was attacked by petitioners on "the larger question whether courts may punish

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[8] See Note, 47 *Columbia Law Rev.* 416, 421 n. 57 (1947).

[9] See Wyzanski, "Standards for Congressional Investigations," 3 *New York City Bar Ass'n.* 93, 106 (1948); *New York Herald Tribune,* April 19, 1948, p. 12, col. 3; H. R. 4564, 80th Cong., 1st Sess. (1947); 94 Cong. Rec. 2413, 2490 (1948).

individuals for not responding to an inquiry by this Committee into their political opinions" (EDGERTON, *J.*, R. 655). Under the Resolution and upon the record in this case, petitioners may have been investigated for other than communist opinions and speech. The House Committee has not confined its inquiries and "exposures" to communism but has, instead, covered ". . . such diverse groups . . . as the American Civil Liberties Union, the C. I. O., the National Catholic Welfare Conference, the American League for Peace and Democracy, the Farmer-Labor Party, sitdown strikes, the Federal Theatre Project, consumers' organizations, the Union for Democratic Action, the magazine Time, the Daily Worker, the Joint Anti-Fascist Refugee Committee, the National Federation for Constitutional Liberties, and the National Council of American-Soviet Friendship. This list is illustrative of the almost unlimited variety of the Committee's investigations." Note, 47 *Columbia Law Rev.* 416, 418 (1947). Irrespective of the claim of Congressional power to investigate communism, the Resolution infringes upon the First Amendment since, on its face and as construed and applied, the Resolution is so vague and indefinite that it authorizes the abridgement of opinion, speech, press and assembly of petitioners and others which are indisputably constitutionally inviolate. *Winters* v. *New York,* 16 U. S. Law Week 4279 (decided on March 29, 1948); *Musser* v. *Utah,* 333 U. S. 95 (1948); *Thomas* v. *Collins,* 323 U. S. 516 (1945); *Martin* v. *Struthers,* 319 U. S. 141 (1943); *Jamison* v. *Texas,* 318 U. S. 413 (1943); *Bridges* v. *California,* 314 U. S. 252 (1941); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Carlson* v. *California,* 310 U. S. 106 (1940); *Schneider* v. *Irvington,* 308 U. S. 147 (1939); *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *DeJonge* v. *Oregon,* 299 U. S. 353 (1937); *Stromberg* v. *California,* 283 U. S. 359 (1931).

The majority opinion of the United States Court of Appeals for the District of Columbia suggests that the

abusive applications of the Resolution by the House Committee may be judicially disregarded as superfluities to be exorcized by the Congress. But the abuses and abridgements by the Committee have been integrated by re-enactment into the Resolution and it is a proper function of this Court to provide relief therefrom. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943). It has been stated on the floor of the Congress that ". . . a large number of us are afraid to vote against the Dies committee. Afraid to vote our honest conviction because we are afraid of the misconceptions and false impressions which that committee, through abundant publicity, has built up in the American public." 89 Cong. Rec. 803 (1943) (Rep. Gale); see also Note, 14 *U. of Chic. Law Rev.* 256, 266 (1947).

B

The Resolution violates the Fifth and Sixth Amendments to the United States Constitution.

The key term of the Resolution is "un-American propaganda activities." The opinions in the Court below indicate that the term "un-American" is vague and indefinite[10] (R. 637-638, 653-654), and apparently, the term "subversive" as it appears in the Resolution was similarly deemed by the Court of Appeals to be vague and indefinite.[11] But the majority opinion concluded that the Resolution was a valid delegation of power by the Congress to the House Committee since the instruction therein to investigate

[10] The chief counsel for the House Committee wrote in 1946:

"The committee has adopted no definition of subversive or un-American activities." (92 Cong. Rec. App. 4743 (1946); see also 81 Cong. Rec. 3285 (1937).)

[11] In *Winters* v. *New York*, 16 U. S. Law Week 4279, 4282 (1948), this Court indicated that it considers "subversive activities" too indefinite as a standard of guilt.

propaganda which "attacks the principle of the form of government as guaranteed by our Constitution" ". . . .is definite enough . . ." (R. 638). Irrespective of whether this clause of the Resolution is definite enough to constitute a delegation of power by the Congress to the House Committee, the same clause failed to convey to this Court any clear or fixed meaning in *Schneiderman* v. *United States,* 320 U. S. 118 (1943).

Guilt or innocence of the action of witnesses before the House Committee depends upon the meaning of the key terms of the Resolution. For it is necessary to refer to the Resolution in order to determine whether petitioners committed a crime under Section 192, Title 2 of the United States Code. The Resolution provides the standard of guilt under Section 192 and, accordingly, the Resolution must conform with the constitutional requirements of definiteness and certainty which pertain to any penal law. *Kraus & Bros.* v. *United States,* 327 U. S. 614 (1946). The Resolution fails to meet those requirements and thereby violates the Fifth and Sixth Amendments to the United States Constitution.[12] *Kraus & Bros.* v. *United States,* 327 U. S. 614 (1946); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Cline* v. *Frink Dairy Co.,* 274 U. S. 445 (1927); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921); *United States* v. *Reese,* 92 U. S. 214 (1875). This defect in the Resolution may not be cured by judicial construction. *United States* v. *Reese,* 92 U. S. 214 (1875); *Butts* v. *Merchants & Miners Transportation Co.,* 230 U. S. 126 (1913); *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500 (1926); *United States* v. *Sullivan,* 332 U. S. 689, 693 (1948). And since the compulsion to answer pertinent questions here affects constitutional rights of petitioners, the Resolution on

[12] In the *Josephson* case the majority did not pass on the definiteness of the Resolution (165 F. (2), 87), while the dissent found it to be too vague under the First, Fifth and Sixth Amendments (*id.,* at 95-97). EDGERTON, *J.,* dissenting herein, also could find no fixed or definite meaning for the terms of the Resolution individually or collectively (R. 653-655).

its face, and without assistance of judicial construction, should provide a narrowly drawn standard of guilt. *Winters* v. *New York*, 16 U. S. Law Week 4279 (1948); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). The subsequent judicial determination that the demand by the House Committee upon petitioners was pertinent does not supply the Resolution with the clearly defined standard of guilt to which petitioners were constitutionally entitled in advance of their appearance before the House Committee. 26 Cong. Globe, 34th Cong., 3rd Sess. 439 *et seq.* (1857); 8 *Wigmore, Evidence* § 2195, p. 80 (3 ed. 1940); Gose, "The Limits of Congressional Investigating Power" 10 *Washington Law Rev.* 61, 138, 153 (1935); Note, 47 *Columbia Law Rev.* 416, 425 (1947).

C

The Resolution violates the Ninth and Tenth Amendments to the United States Constitution.

A basic constitutional right is the "exemption of [one's] private affairs, books, and papers from the inspection and scrutiny of others." *In re Pacific Railway Commission*, 32 Fed. 241, 250 (N. D. Cal. 1887) (FIELD, *J.*); *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881); *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1 (1936). The Congressional power of investigation has, accordingly, been circumscribed by the limits first prescribed in *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881). Like other implied powers, the Congressional power of investigation "is a means to an end and not the end itself"; it "rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred." *Marshall* v. *Gordon*, 243 U. S. 521, 541 (1917); see also *Sinclair* v. *United States*, 279 U. S. 263, 291 (1929); *McGrain* v.

Daugherty, 273 U. S. 135, 173 (1927); *In re Chapman*, 166 U. S. 661, 667 (1897); *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613 (1929); *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376, 388 (1928).

The constitutional functions of the Congress which may be assisted by investigation include: control by the Congress of its members (Art. I, § 5, Cl. 1, 2); impeachment (Art. I, § 3, Cl. 6); the power to make the appropriations required for the administration of the laws (Art. I, § 7, Cl. 1); and the formulation of legislation (Art. I, § 8). Investigations into elections or corruption of legislators (*In re Chapman*, 166 U. S. 661 (1897); *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376 (1928); *Barry* v. *United States*, 279 U. S. 597 (1929)) and into the affairs of public officials or departments to determine whether the laws are properly administered (*McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929)) were not, in scope and in purpose, investigations into the private affairs of private persons although inquiry into those private affairs may have been incidental thereto. But where the objective of an investigation is future general legislation, then the scope of the investigation may be defined in terms of the private affairs of private citizens.

Kilbourn v. *Thompson*, 103 U. S. 168 (1881), is the only instance where this Court considered an investigation which has for its defined scope the private affairs of private citizens. It was there held that if the investigation is such "that it could result in no valid legislation on the subject to which the inquiry referred," the investigation would be declared "void for want of jurisdiction in that body." *Kilbourn* v. *Thompson*, 103 U. S. 168, 193, 196 (1881). Such a void investigation was held to be without the constitutional grant of power to the Congress contained in Article I, Section 1 or Article I, Section 8, Clause 18 and therefore in derogation of the powers reserved to the

people and to the States by the Ninth and Tenth Amendments.

Kilbourn v. *Thompson* has never been overruled by this Court.

The scope of the investigation authorized by the Resolution is an unlimited inquiry into the private affairs of private persons and the Resolution is therefore unconstitutional because it does not relate directly to prospective valid legislation. It is not sufficient that the investigation may result in some valid legislation wholly incommensurate with its scope. *Eberling, Congressional Investigations* 383 (1928). The investigation considered in *Kilbourn* v. *Thompson*, as any investigation, contained some possibility of future legislation.[13] The right of security for the private affairs of private citizens prohibits an extensive Congressional inquiry into those matters on the slight pretext of a mere possibility of future legislation. The only legislation to which the House Committee investigation is plausibly related is legislation affecting political expression and opinion. The remarkable paucity of legislation produced by this Committee and its predecessors[14] is indicative of what may be expected in the future. For that paucity of legislation is not due to any lack of diligence on the part of the House Committee; the real block is the Bill of Rights. The House Committee has repeatedly stated that the objective of the House Committee is not to produce legislation but to accomplish by publicity and "exposure" what it could not constitutionally accomplish by legislation.[15] An investigation which, at best, abridges speech in an effort to determine whether and what speech

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[13] See Landis, "Constitutional Limits on the Congressional Power of Investigation," 40 *Harvard Law Rev.* 153, 216-217 (1926).

[14] See Notes, 96 *U. of Penn. Law Rev.* 381, 396 (1948); 14 *U. of Chic. Law Rev.* 256, 259 (1947); 47 *Columbia Law Rev.* 416, 427 n. 109 (1947); 94 Cong. Rec. 2495 (1948).

[15] See Note, 47 *Columbia Law Rev.* 416, 427 n. 110 (1947).

may be abridged is in violation of the Ninth and Tenth Amendments.

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Petitioners in urging the unconstitutionality of the Resolution do not thereby urge this Court to weaken but to fortify the Congressional investigatory power. In a democracy, public confidence in the integrity and fairness of an institution of Government is essential if that institution is to be vital and effective. "Friends and supporters of the congressional power may well fear its present exercise here and find the application of a proper restraint a source of strength in the long run, rather than the reverse. For a widespread belief that the Committee is acting in an Un-American way to even an American end will destroy the Committee's usefulness in the eyes of 'a liberty-loving people.' "[16]

III

It was reversible error for the trial Court to admit into evidence petitioners' testimony before the House Committee.

Section 634, Title 28 of the United States Code provides that no testimony given by a witness before a Congressional committee shall be used against him in a subsequent criminal prosecution except in a prosecution for perjury committed in the giving of such testimony. Upon the trial herein a transcript of petitioners' testimony before the House Committee (Gov. Ex. 6) was admitted into evidence and read to the jury over objections (R. 23-31, 38, 370, 400).

Section 634 is, on its face, available to petitioners. It does not require petitioners to assert a claim of privilege. *United States* v. *Monia*, 317 U. S. 424 (1943); *Jacobs* v.

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[16] *Josephson* v. *United States*, 165 F. (2) 82, 100 (C. C. A. 2, 1947), *cert. den.* 333 U. S. —— (1948) (CLARK, *J.*, dissenting).

United States, 161 Fed. 694 (C. C. A. 1, 1908); *Alkon* v. *United States*, 163 Fed. 810 (C. C. A. 1, 1908); 8 *Wigmore, Evidence* § 2283, p. 529 (3 ed., 1940). Upon a claim of privilege, petitioners could not have been compelled to testify (*Counselman* v. *Hitchcock*, 142 U. S. 547 (1892); *United States* v. *DeLorenzo*, 151 F. (2) 122 (C. C. A. 2, 1945)) so that Section 634 is applicable only to instances where the privilege is not asserted.

The Court below affirmed (R. 642-643) the decision of the trial Court to read another exception into Section 634 for contempt, "or conspiracy leading to contempt" (R. 31). The decision of the trial Court rested upon the premise that if testimony before a Congressional committee is not admissible in a contempt prosecution, the prosecution will fail for lack of proof (R. 29).

The error in this argument is readily apparent when it is considered that the Government has proceeded for contempt against witnesses who have stood mute. In the case at bar, the Government has attempted, by offering evidence other than that of the petitioners' testimony, to prove independently the non-production of the books and records sought by the Committee (R. 230) thereby indicating that the Government is not precluded from proving the charged default where the constitutionally-derived protection afforded witnesses by Section 634 is respected.

That the admission into evidence of the testimony of the defendants would assist the Government in this prosecution is no basis for depriving petitioners of the safeguards contained in Section 634. In *Cameron* v. *United States*, 231 U. S. 710 (1914), testimony of the bankrupt in one bankruptcy proceeding was offered to prove that the bankrupt had committed perjury in another subsequent bankruptcy proceeding. A statute similar to Section 634 was invoked by the accused with respect to the prior testimony. The Supreme Court held the testimony, which would have been

of assistance to the perjury prosecution, to be inadmissible. And it has also been held that testimony under a statute such as Section 634 is inadmissible in a subsequent prosecution to test the credibility of the witness (*Jacobs* v. *United States,* 161 Fed. 694 (C. C. A. 1, 1908); *Alkon* v. *United States,* 163 Fed. 810 (C. C. A. 1, 1908)); or to aid a subsequent prosecution against a witness for criminal contempt (*Wakefield* v. *Housel,* 288 Fed. 712 (C. C. A. 8, 1923); *In re Haley,* 41 F. (2) 379 (S. D. Cal., 1930)).

The exception in Section 634 for perjury provides no analogy for this contempt prosecution. That exception is necessary for otherwise the only possible evidence of a crime committed by the testimony would be unavailable. The crime of contempt—especially where, as here, the alleged contempt is the refusal to produce certain books and records and not the testimony given at the hearing—can be proven independently of the testimony. The admission of the testimony given before the House Committee into evidence went far beyond any exceptions to Section 634 which might obtain for testimony necessary to prove a crime committed by that testimony; the testimony admitted here was evidence not of the commission of the alleged contempt, it was heated colloquy between the witnesses and the House Committee given under conditions unfavorable and provocative to the witnesses. Consequently, the perjury exception of Section 634 does not extend to this contempt prosecution and the case of *Glickstein* v. *United States,* 222 U. S. 139 (1911), relied upon by the trial Court (R. 26), is not here apposite. Note, 15 *U. of Chic. Law Rev.* 442 (1948). Indeed, the reading of an exception for the contempt here alleged into Section 634 tends to defeat the efficacy of Congressional investigating committees. Anything which discourages witnesses from testifying, which compels reliance upon claims of immunity, hampers the activities of such committees.

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia involves important questions relating to the Constitution and to federal statutes which have not been, but should be, settled by this Court. Federal questions have been decided in a way probably in conflict with applicable decisions of this Court. Wherefore, the petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia to review its judgment and decree.

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